

**FIRE**Foundation for Individual
Rights and Expression

July 6, 2023

Via CM/ECF

Mark J. Langer, Clerk of Court
United States Court of Appeals
For the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re: *Woodhull Freedom Foundation v. United States*, No. 22-5105

Dear Mr. Langer,

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellants hereby respond to the government's submission of supplemental authority, citing *United States v. Hansen*, 2023 WL 4138994 (2023).

The government cited *Hansen's* holding that the terms “encourage” or “induce” as used in the Immigration and Nationality Act (“INA”) should be interpreted in their “specialized, criminal-law sense” to mean aiding and abetting, and when so interpreted the law reaches only speech integral to criminal conduct. The government suggests the same principles support affirmance in this case. That conclusion is unwarranted.

First, the government's conclusion overlooks major differences between the specific language of FOSTA and the INA. The Court observed that the INA provision at issue in *Hansen* “encompasses a great deal of nonexpressive conduct,” including smuggling, providing counterfeit immigration documents, and issuing counterfeit Social Security numbers as examples of “heartland . . . prosecutions.” 2023 WL 4138994 *3. FOSTA, by contrast, does not specify any *actus reus* other than “own[ing], manag[ing], or operat[ing] an interactive computer service,” which means it reaches *only* expressive conduct. Appellant's Reply at 10-11. This issue was discussed extensively at oral argument. Tr. 9-10, 20-22, 43-46, 48-49, 58-61.

Second, the specific question in *Hansen* was “whether Congress used ‘encourage’ and ‘induce’ [in the INS] as terms of art.” 2023 WL 4138994 *5. Under its reasoning, even if the term “facilitates” is interpreted to mean “aiding and abetting,” it does not apply to FOSTA, which includes the additional disjunctive term “promote,” which is capable of multiple and wide-ranging meanings.

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Appellant's Br. 31-32; Appellant's Reply 9. This distinction also was addressed at oral argument. Tr. 29-30, 53, 55.

Third, the Court in *Hansen* made clear that "ordinary principles of interpretation apply," 2023 WL 4138994 *10 n.3, which, in the case of FOSTA, should include the *noscitur a sociis* canon. Appellants' Br. 29; Appellant's Reply 6-8; Tr. 12, 20, 33-34, 70-71. Accordingly, the Court's analysis of the INA in *Hansen* does not control interpretation of FOSTA's different statutory framework.

Respectfully submitted,

/s/ Robert Corn-Revere
ROBERT CORN-REVERE
bob.corn-revere@thefire.org
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Avenue SE
Suite 340
Washington, DC 20003

DAVID GREENE
AARON MACKEY
CORYNNE MCSHERRY
davidg@eff.org
amackey@eff.org
corynne@eff.org
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109

LAWRENCE G. WALTERS
larry@firstamendment.com
WALTERS LAW GROUP
195 W. Pine Ave.
Longwood, FL 32750-4104

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DAPHNE KELLER
daphnek@law.stanford.edu
STANFORD CYBER POLICY
CENTER
616 Jane Stanford Way #E016
Encina Hall
Stanford, CA 94305

Attorneys for Appellants

cc: all counsel (via CM/ECF)